

Supreme Court, U. S.
FILED

MAY 11 1976

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-1464

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOSEPH M. MC CRANE, JR.,

Respondent.

**BRIEF OF RESPONDENT JOSEPH M. MC CRANE, JR.,
IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

EDWIN P. ROME
THOMAS A. BERGSTROM
Attorneys for Respondent

Of Counsel:

BLANK, ROME, KLAUS & COMISKY
1100 Four Penn Center Plaza
Philadelphia, Pennsylvania 19103
(215) 569-3700

(8673)

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J.
(201) 257-6850

New York, N.Y.
(212) 563-2121

Philadelphia, Pa.
(215) 563-5587

Washington, D.C.
(202) 783-7288

TABLE OF CONTENTS

	<i>Page</i>
Counterstatement of the Case	2
Argument	2
Conclusion	5

TABLE OF CITATIONS

Cases Cited:

Brady v. Maryland, 373 U.S. 83 (1963)	2, 3, 5
Giglio v. United States, 405 U.S. 150 (1972)	2, 3
United States v. Agurs, 510 F.2d 1249 (D.C. Cir. 1975), cert. granted, 44 U.S.L.W. 3304 (1975)	4, 5
United States v. Pfingst, 490 F.2d 262 (2d Cir. 1973), cert. denied, 417 U.S. 919 (1973)	4, 5

United States Constitution Cited:

Fifth Amendment	2
Sixth Amendment	2

In The
Supreme Court of the United States

October Term, 1975

No. 75-1464

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOSEPH M. MC CRANE, JR.,

Respondent.

**BRIEF OF RESPONDENT JOSEPH M. MC CRANE, JR.,
IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

This brief by respondent Joseph M. McCrane, Jr., is submitted in opposition to the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. On March 15, 1976, Joseph M. McCrane, Jr., filed a petition for writ of certiorari at No. 75-1323.

COUNTERSTATEMENT OF THE CASE

The respondent Joseph M. McCrane, Jr., hereby adopts and reasserts, for the purposes of the Counterstatement of the Case, all that which is included within the Statement of the Case at Petition No. 75-1323 filed on March 15, 1976.

ARGUMENT

The questions before this Court are not those stated by the government, but are rather those of the petitioner Joseph M. McCrane, Jr., Petition No. 75-1323, namely: what should be the overall effect of the government's deliberate, intentional advertent suppression of *Giglio* impeachment evidence in violation of the petitioner's Fifth and Sixth Amendment rights?

The government's petition for writ of certiorari should be denied in that, the unanimous decision of the court below gave full consideration to the issues; the government's narrow and crabbed view of this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963); and *Giglio v. United States*, 405 U.S. 150 (1972) is contrary to those decisions; the government references decisions which are clearly distinguishable and not controlling; and the government repeatedly alludes to factual matters unsupported by the record.

The government urges that the doctrine enunciated by this Court's holding in *Giglio v. United States*, *supra*, is not activated until such time as the government witness testifies falsely concerning a matter affecting his credibility. This distortion of the Court's holding in *Giglio* and necessarily that of *Brady* is

without foundation or precedent and has neither been adopted nor advanced by any court in dealing with this issue. The government's argument, advanced to its logical conclusion, would mean that, notwithstanding a pretrial request, the critical impeachment evidence would remain suppressed until such time as counsel discovered it during cross-examination or the witness testified falsely. The government's view that evidence affecting credibility is neither discoverable nor produceable short of perjured testimony is totally alien to the spirit, as well as the decisions of this Court in *Brady* and *Giglio*. In so urging, the government would relegate the due process-fair trial concept to a sporting event, matching the government's authority to suppress impeachment evidence against a defendant's limited ability to discover same or produce perjured testimony.

The petition is otherwise singularly subjective in its analysis of the facts. The government asserts regarding the suppressed evidence herein involved that "the matter was not part of any bargain through which the witness' testimonial cooperation was procured" (Petition No. 75-1464, pp. 2, 11, 12). There is absolutely nothing contained in this record which would remotely justify such a statement. Indeed, it is, *inter alia*, that very issue which the respondent could have explored in depth had not the evidence been deliberately withheld.

Furthermore, the government relies heavily upon the respondent's trial strategy, *vis-a-vis* the witness Bellante during the second trial, and the lack of concerted cross-examination of him on the issue of credibility. Although footnoted (Petition No. 75-1464, p. 4, fn. 2), the government fails to appreciate or fully

present to this Court that indeed Bellante's credibility was vigorously attacked during the first trial in Newark. It is naive to expect competent counsel representing respondent to make continued trips to the credibility well, only to return dry, particularly in the face of repeated denials by the government of the existence of any such impeachment evidence. Indeed, even the District Court's prodding failed to produce the critical evidence (Petition No. 75-1323, p. 8, fn. 4).

The petition continues that, "the nature of the adversary process is materially altered if, *as has happened here*, the defense is relieved of all duty to inquire into matters of this nature and if, in fact, its lack of diligence is actually rewarded with a grant of a new trial." (Petition No. 75-1464, p. 14) (emphasis added). The statement is consistent with the government's insistence on turning a blind eye to the facts of this case and is totally unsupported by the record.

Finally, the government, in a vain effort at self-justification informs this Court, after apparent communication with the United States Attorney, "that there was no conscious election of non-disclosure." (*Id.* at p. 17, fn. 11). The court below unanimously found otherwise.

The government's reliance on *United States v. Agurs*, 510 F.2d 1249 (D.C. Cir. 1975), *cert. granted*, 44 U.S.L.W. 3304 (1975) argued April 28, 1976, and *United States v. Pfingst*, 490 F.2d 262 (2d Cir. 1973), *cert. denied*, 417 U.S. 919 (1973), is misplaced. The ultimate decision by this Court in *Agurs* will not be dispositive of the questions raised by the government or by

the petitioner Joseph M. McCrane, Jr. *Agurs* involved the failure of defendant's counsel to request the crucial *Brady* evidence and his otherwise lack of diligence in discovering same. In the instant case, the record contains no such infirmity.

Pfingst is as readily distinguishable in that the court found that the undisclosed evidence was cumulative, of minimal, if any, value and the non-disclosure was inadvertent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

s/ Edwin P. Rome

s/ Thomas A. Bergstrom

Attorneys for Respondent

BLANK, ROME, KLAUS & COMISKY
Of Counsel